Supreme Court, U.S.
FILED

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No. . . .

**SUPREME COURT OF THE UNITED STATES**

MAGUS D. ORR, and ANDRE L. SMITH,
Petitioners,

v.

STATE OF OHIO,
Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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## I. QUESTION PRESENTED FOR REVIEW

Does a temporary police checkpoint, set up to conduct indiscriminate stops of motor vehicles in order to inspect whether the driver has a valid driver's license, violate the Fourth Amendment to the United States Constitution?

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Fourth Amendment . . . . . *passim*

No. . . . . .

**SUPREME COURT OF THE UNITED STATES**

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MAGUS D. ORR, and ANDRE L. SMITH,
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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO**

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Petitioners, Magus D. Orr and Andre L. Smith, pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on May 2, 2001.

## II. OPINIONS BELOW

The opinions of the Dayton Municipal Court, entered September 30, 1998, appear in the appendix to this petition. The opinion of the Court of Appeals for Montgomery County, Ohio, entered January 14, 2000, and the opinion of the Supreme Court of Ohio, entered May 2, 2001, also appear in the appendix to this petition.

## III. JURISDICTION

The Supreme Court of Ohio entered its decision on May 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**The Fourth Amendment to the United States Constitution:**

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## V. STATEMENT OF THE CASE

On June 17, 1998, Petitioner, Magus Orr, was stopped at a driver's license checkpoint established by the City of Dayton Police Department. He was cited for driving without a license in violation of R.C. § 4507.02(A)(1). On June 17, 1998, Petitioner, Andre Smith, was stopped at a driver's license checkpoint and also cited for driving without a license in violation of R.C. § 4507.02(A)(1), as well as some various equipment violations.

Each Petitioner pled not guilty the day following arrest. Each Petitioner filed a motion to suppress on July 10, 1998. The motions to suppress maintained that the checkpoints violated the Fourth Amendment to the United States Constitution, as well as its companion provision in the

Constitution of Ohio. On August 31, 1998, a hearing was held before Dayton Municipal Court Judge Alice O. McCollum, in the case of another individual, Kevin Smith. The relevant facts for Petitioners Andre Smith and Magus Orr were stipulated to by counsel, in conjunction with the testimony presented in Kevin Smith's case.[1]

The State's principal witness at the hearing was Lieutenant John Bardun of the Dayton Police Department. Lieutenant Bardun testified that the "checkpoints would be pattern stops . . . where we would ask people if they had a driver's license." The primary function of the checkpoints was alleged to be a check for drivers' licenses. However, the locations for the checkpoints were determined after consultation with District Commanders, and some were located in "target enforcement areas." These were described as areas where there were problems with "both traffic and crime[.]" Thus, it was believed that the checkpoints would "have positive affects on crime rate and -- umm -- order maintenance." There was never any statistical analysis done of where the majority of people lived that drove without a license, to assist in choosing locations. This was claimed to simply be a "police tactic or practice" used in other jurisdictions, and the Dayton Police "wanted to start using that as a practice."

No witness for the State testified about any empirical study or statistical analysis that demonstrated the State's interest in curbing the alleged threat that unlicensed drivers pose to the public. In fact, Lieutenant Bardun testified that

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[1] The case of Kevin Smith was reversed by the Court of Appeals for Montgomery County on grounds unrelated to the checkpoints and therefore was not involved in the appeal to the Supreme Court of Ohio, nor is it involved in this Petition.

he was unaware of any correlation between a person safely operating a motor vehicle and his or her validity with the Bureau of Motor Vehicles.

The Dayton Municipal Court sustained the motions to suppress on September 30, 1998. Chiefly, the court found that the State did not establish the gravity of the claimed interest to such a degree that would justify the checkpoints. Furthermore, the court held that "the checkpoints established merely for the apprehension of unlicensed drivers is an unreasonable search and seizure which violates the United States and Ohio Constitutions."

The State of Ohio appealed each case. On November 23, 1998, the cases were consolidated for purposes of appeal. The Montgomery County Court of Appeals reversed the decisions of the trial court in a two-to-one majority decision rendered January 14, 2000. The court of appeals held, despite the utter lack of any empirical data supporting the contention that unlicensed drivers posed a threat to the public, that the state's interest in keeping unlicensed drivers off the roads justified the checkpoints.

Petitioners requested jurisdiction from the Supreme Court of Ohio, which was granted on May 31, 2000. The Supreme Court of Ohio affirmed the decision of the court of appeals on May 2, 2001. The Supreme Court of Ohio relied upon this Court's decisions in *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976), and *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444 (1990) to find that a driver's license checkpoint does not violate the Fourth Amendment to the United States Constitution.

## VI. REASON FOR GRANTING THE WRIT

The idea that government agents may seize people at checkpoints without having any suspicion of wrongdoing is very un-American. As borders, barriers, and checkpoints are disappearing in Europe, and promoting freer flow of travel between nations, the United States of America is embarking upon the exploitation of a twenty-five year old Supreme Court decision designed to help law enforcement keep people out. This exploitation is manifest in the increasing use of driver's license checkpoints. A driver's license checkpoint should not find support from the decision in *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976), and its progeny. Additionally, a careful analysis of the Fourth Amendment to the United States Constitution reveals that *Martinez-Fuerte*, and its progeny, were decided in error.

The Fourth Amendment to the United States Constitution says:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Terry v. Ohio*, the Fourth Amendment is referred to as the "inestimable right of personal security [that] belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio,* 392 U.S. 1, 8-9 (1968).

Nevertheless, the decision in *Terry* permitted a limited seizure, and pat-down search, of a citizen on a street when

the officer lacked a warrant and probable cause. In this context the Court held that the Fourth Amendment's general proscription against unreasonable searches and seizures is a citizen's only protection. *Terry*, at 20. Accordingly, "[i]n order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' *Camara v. Municipal Court*, 387 U.S. 523, 534-535, 536-537 (1967). *And* in justifying the particular intrusion the police officer *must* be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, at 20-21 (emphasis added). This latter requirement was referred to as "the central teaching of this Court's Fourth Amendment jurisprudence." *Id.*, at 22 (n.18)(citations omitted).

It was apparently not without trepidation that this Court in *United States v. Martinez-Fuerte* eliminated "the central teaching" of the Fourth Amendment when it permitted routine stops, without reasonable and articulated suspicion, at permanent checkpoints designed to interdict illegal aliens. This Court went to great lengths to explain how "interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems." 428 U.S., at 552. The need to have inland checkpoints was considered very great in order to effectively deal with the problem. *Id.*, at 557. After conducting an extensive balancing test, a *permanent* checkpoint to interdict illegal aliens was held to be reasonable. *Id.*, at 566-567.

Subsequently, this Court approved temporary checkpoints

designed to discover drivers under the influence of alcohol. *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444 (1990). Again, this Court extensively explained the gravity of the drunk driving epidemic before permitting suspicionless stops of motor vehicles. *Id.*, at 451. The balancing of the competing interests, for a majority of the Court, weighed in favor of permitting checkpoints designed to prevent drunk driving. *Id.*, at 455.

The decisions in *Martinez-Fuerte* and *Sitz* appear sensitive to the obvious concerns that are associated with eliminating the requirement of individualized suspicion of criminal wrongdoing. Both decisions rely heavily upon substantial security and safety interests believed to be at stake that tip the scales in favor of allowing suspicionless stops. A firm adherence to that sensitivity should result in this Court striking down the driver's license checkpoints at issue in the instant case. The record in this case lacks any empirical data to support a substantial safety and security interest the likes of which would eliminate the Fourth Amendment's requirement of individualized suspicion.

However, the evolution of the law that begins with the decision in *Martinez-Fuerte* also reveals a deterioration of Fourth Amendment limitations upon governmental intrusion. The "central teaching" of the Fourth Amendment that was proudly expressed in *Terry v. Ohio* is abandoned in the name of safety and security. Once abandoned, it becomes easily forgot. What can result is the repetition of *dicta* that indicates a driver's license checkpoint is permissible under the Fourth Amendment, despite a serious lack of analysis concerning the interests at stake. *Indianapolis v. Edmond*, 531 U.S. 32, 37-38, 39-40, 47 (2000) (citing, *Delaware v. Prouse*, 440 U.S. 648, 1979).

Petitioners, like Justice Thomas, "are not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided." *Edmond*,

at 56 (Justice Thomas dissenting). Individualized suspicion of wrongdoing should not be easily abandoned in the name of safety and security. As Benjamin Franklin wisely said, "they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." Ample evidence exists to suggest that the Framers of the Fourth Amendment to the United States Constitution would have found suspicionless seizures unreasonable. For example, George Mason, an active contributor to the Bill of Rights, drafted the Virginia Declaration of Rights that was unanimously adopted by the Virginia Convention of Delegates on June 12, 1776. This document contains a predecessor to the Fourth Amendment in section 10:

> That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not *particularly described and supported by evidence*, are grievous and oppressive, and ought not to be granted. (emphasis added.)

The Maryland Constitution of 1776, Declaration of Rights, article 23, states:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants — to search suspected places, or to apprehend suspected persons, without naming or describing the place, *or the person in special* — are illegal, and ought not to be granted. (emphasis added.)

Illegal seizures of the person were as much a reason for rebellion against the British as excessive taxation and inadequate representation. Petitioners maintain that the Framers of the Fourth Amendment would certainly condemn the indiscriminate and suspicionless seizures that occur at a driver's license checkpoint.

## VII. CONCLUSION

Driver's license checkpoints are different from checkpoints designed to discover illegal aliens or remove intoxicated drivers from the road. A nation's right to protect its borders is generally accepted, and the danger that intoxicated drivers present to the roads cannot be challenged. However, the danger that unlicensed drivers may present has not been established in this case. One should seriously question whether issues concerning unlicensed drivers could ever equate to the issues in *Martinez-Fuerte* and *Sitz*. Petitioners questioned, and the State of Ohio did not present proof.

Petitioners also maintain that a seizure's degree of intrusiveness has a direct correlation to its legitimacy. A border or DUI stop is much more understandable than a stop well within the United States done for the sole purpose of checking for the proper traveling papers. The intrusiveness of the seizure increases with a greater perception of illegitimacy. Accordingly, a driver's license checkpoint is not analogous to the checkpoints upheld in *Martinez-Fuerte* and *Sitz*.

Petitioners also submit that the decisions in *Martinez-Fuerte* and *Sitz* should be reexamined. The Fourth Amendment to the United States Constitution was drafted in a way that espouses the necessity of individualized suspicion. At one time, this Court's jurisprudence recognized this. Unfortunately, liberty was sacrificed for safety. Such a

sacrifice would certainly be foreign to the Framers of the Fourth Amendment.

For these compelling reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

**THE STATE OF OHIO, APPELLEE, v. ORR, APPELLANT. THE STATE OF OHIO, APPELLEE, v. SMITH, APPELLANT.**

**No. 00-408**

**SUPREME COURT OF OHIO**

***91 Ohio St. 3d 389; 745 N.E.2d 1036***

**January 10, 2001, Submitted**

**May 2, 2001, Decided**

**PRIOR HISTORY:**
APPEAL from the Court of Appeals for Montgomery County, Nos. 17476 and 17477.

**DISPOSITION:**
Affirmed.

**SYLLABUS:**
In determining the constitutionality of a driver's license checkpoint, a court must evaluate, on a case-by-case basis, the checkpoint's intrusion on privacy, the state's interest in maintaining the checkpoint, and the extent to which the checkpoint advances the state interest.

**COUNSEL:**
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Chief Administrative Counsel, and Deirdre Logan, Acting Chief Prosecutor, for appellee.

Carl G. Goraleski and Anthony R. Cicero, Assistant Public Defenders, for appellants.

Betty D. Montgomery, Attorney General, David M. Gormley, Associate Solicitor, and David V. Patton, Assistant Solicitor, urging affirmance for amicus curiae Attorney General of Ohio.

Barry M. Byron, Stephen L. Byron and John Gotherman, urging affirmance for amicus curiae Ohio Municipal Attorneys Association.

Flanagan, Lieberman, Hoffman & Swaim and Richard Hempfling, urging reversal for amicus curiae American Civil Liberties Union of Ohio Foundation.

**JUDGES:**
FRANCIS E. SWEENEY, SR., J., MOYER, C.J., DOUGLAS, RESNICK, PFEIFER and LUNDBERG STRATTON, JJ., concur. COOK, J., concurs in judgment.

**OPINION BY:**
FRANCIS E. SWEENEY, SR.

**OPINION:**

[**1037] [*390]
DECISION OF THE COURT

**FRANCIS E. SWEENEY, SR., J.** From June 8, 1998 through June 20, 1998, the city of Dayton operated a system

of driver's license checkpoints designed to identify and remove unlicensed drivers and drivers with suspended licenses from the roads. The checkpoints were set up at various locations in Dayton, including major thoroughfares and "target enforcement areas"--districts characterized by problems of traffic and crime. Upon arrival at a checkpoint site, the police would set up reflective signs that warned drivers of the upcoming checkpoint. The checkpoints were staffed by anywhere between eleven and thirteen officers. Several police cruisers were also present at the checkpoints.

As cars entered the checkpoints, they would be stopped according to some pattern that varied according to the amount of traffic on the road. If traffic was particularly light, every car would be stopped. Drivers who were stopped at these checkpoints were immediately advised of the purpose of the checkpoint and were asked to produce their driver's licenses. Drivers who produced a valid license would have their licenses returned to them along with [**1038] a pamphlet explaining the checkpoint program and thanking them for their cooperation. The length of detention for those possessing a valid driver's license was usually about forty-five seconds.

Drivers who were unable to produce a valid driver's license had their names, dates of birth, and Social Security numbers entered into the officers' computers to check whether they possessed a valid license. If the computer showed that a driver was properly licensed and was not wanted by the police for any reason, the driver would be given the pamphlet, thanked, and released back into traffic. This entire process would take an additional two minutes or so to complete. Drivers without a valid license were cited for the violation, which added approximately ten minutes to the overall length of detention.

On June 17, 1998, appellant Magus Orr was stopped at a driver's license checkpoint and cited for driving without a

license in violation of *R.C. 4507.02(A)(1)*. That same night, appellant Andre Smith was stopped at a driver's license checkpoint at another location. Smith was cited for driving without a license in violation of *R.C. 4507.02(A)(1)*, operating a motorcycle without the required endorsement in violation of *R.C. 4507.02(A)(3)*, driving with expired license plates in violation of *R.C. 4503.21*, and operating a motorcycle without a helmet--required for novice riders--in violation of *R.C. 4511.53*. [*391]

Both of the appellants pleaded not guilty. Each appellant also filed a motion to suppress, claiming that his seizure was unconstitutional under the Ohio and United States Constitutions and that all evidence obtained as a result of his seizure should be suppressed. The trial court granted appellants' motions to suppress. The court concluded that because the state had offered no evidence to suggest that the driver's license checkpoints were a necessary or effective means of promoting roadway safety, they constituted an unreasonable search and seizure under the Ohio and United States Constitutions. The state appealed the trial court's decisions to the Second District Court of Appeals. In a consolidated case, the court of appeals reversed the trial court, concluding that driver's license checkpoints are a reasonable method by which to deal with the public danger posed by unlicensed drivers. Orr and Smith filed a joint notice of appeal. The cause is now before this court upon our allowance of a discretionary appeal.

We are asked to decide whether Dayton's driver's license checkpoint program violated the search and seizure provisions of the Ohio and United States Constitutions. For the reasons that follow, we sustain the program's constitutionality.

The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides, "The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Section 14, Article I of the Ohio Constitution, which contains language nearly identical to its federal counterpart, also prohibits unreasonable searches and seizures.[1] Because [**1039] Section 14, Article I and the Fourth Amendment contain virtually identical language, we have interpreted the two provisions as affording the same protection. See *State v. Robinette (1997), 80 Ohio St. 3d 234, 238, 685 N.E.2d 762, 766-767.* The search and seizure provisions of the Ohio and United States Constitutions are implicated in this case because a vehicle stop at a highway checkpoint constitutes a "seizure" within the meaning of the Ohio and United States Constitutions even though the purpose of the stop is limited and the resulting detention brief. *Delaware v. Prouse (1979), 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667.*

A number of federal and state courts have upheld the seizure of motorists at driver's license checkpoints. See, *e.g., United States v. McFayden (C.A.D.C.* [*392] *1989), 275 U.S. App. D.C. 207, 865 F.2d 1306; United States v.*

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[1]Section 14, Article I of the Ohio Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

*Prichard (C.A.10, 1981), 645 F.2d 854; LaFontaine v. State (1998), 269 Ga. 251, 497 S.E.2d 367; State v. Cloukey (Me.1985), 486 A.2d 143; State v. Grooms (1997), 126 N.C. App. 88, 483 S.E.2d 445.* Although the United States Supreme Court has never fully considered the constitutionality of a driver's license checkpoint, it has repeatedly suggested in *dicta* that it would uphold properly administered driver's license checkpoints. For instance, in *Prouse*, the United States Supreme Court held that the Fourth Amendment prohibits a police officer from arbitrarily stopping an automobile for the sole purpose of checking the driver's license and registration. The court stressed, however, that this holding did not preclude states from developing methods for spot checks, including the "questioning of all oncoming traffic at roadblock-type stops." *Prouse, 440 U.S. at 663, 99 S. Ct. at 1401, 59 L. Ed. 2d at 673-674.* Similarly, in *Indianapolis v. Edmond (2000), 531 U.S. 32, 121 S. Ct. 447, 457, 148 L. Ed. 2d 333, 347,* the Supreme Court invalidated drug interdiction checkpoints implemented primarily to uncover evidence of criminal wrongdoing but cautioned that its decision did nothing to alter the constitutional status of driver's license checkpoints.

The United States Supreme Court's cases generally accord more Fourth Amendment protection to persons who are subjected to roving-patrol stops than to those who are stopped at roadblock, or checkpoint-type, stops like that involved in the case at bar. The different treatment of checkpoint and roving-patrol stops makes sense, given the essential purpose underlying the Fourth Amendment. The Fourth Amendment "imposes a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order '"to safeguard the privacy and security of individuals against arbitrary invasions."'" (Footnote omitted.) *Prouse, 440 U.S. at 653-654, 99 S. Ct. at 1396, 59 L. Ed. 2d*

*at 667*, quoting *Camara v. Mun. Court of San Francisco (1967), 387 U.S. 523, 528, 87 S. Ct. 1727, 1730, 18 L. Ed. 2d 930, 935.* The crucial distinction between roving-patrol stops and checkpoint stops is the degree to which they intrude upon motorists' privacy and sense of security. "The subjective intrusion--the generating of concern or even fright on the part of lawful travelers--is appreciably less in the case of a checkpoint stop." *United States v. Martinez-Fuerte (1976), 428 U.S. 543, 558, 96 S. Ct. 3074, 3083, 49 L. Ed. 2d 1116, 1128.* "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *United States v. Ortiz (1975), 422 U.S. 891, 894-895,* [**1040] *95 S. Ct. 2585, 2588, 45 L. Ed. 2d 623, 628.* Many motorists accept checkpoint stops as incidental to highway use. *Martinez-Fuerte, 428 U.S. at 561, 96 S. Ct. at 3084, 49 L. Ed. 2d at 1130, fn. 14.*

In determining the constitutionality of a police checkpoint, courts evaluate the following three factors: (1) the particular checkpoint's intrusion on privacy, (2) [*393] the state's interest in maintaining the checkpoint, and (3) the extent to which the checkpoint advances the state interest. *Michigan Dept. of State Police v. Sitz (1990), 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412.* The United States Supreme Court has relied upon this analysis in upholding sobriety checkpoints--roadblocks at which drivers are checked for being under the influence of alcohol or mind-altering drugs--and roadblocks designed to intercept illegal immigrants. See *id.* (sobriety checkpoints); *Martinez-Fuerte, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116* (immigration checkpoints). The courts of several jurisdictions have extended the analysis to cases involving driver's license checkpoints. See, *e.g., McFayden, 275 U.S. App. D.C. 207, 865 F.2d 1306; Cloukey, 486 A.2d 143.* We agree with those jurisdictions that have

concluded that the analysis employed by the United States Supreme Court in its cases on sobriety and immigration checkpoints is appropriate for review of driver's license checkpoints. Therefore, we hold that in determining the constitutionality of a driver's license checkpoint, a court must evaluate, on a case-by-case basis, the checkpoint's intrusion on privacy, the state's interest in maintaining the checkpoint, and the extent to which the checkpoint advances the state interest. Applying this three-pronged analysis, we find that Dayton's driver's license checkpoints were consistent with the search and seizure provisions of the Ohio and United States Constitutions.

Like most checkpoint stops, Dayton's driver's license checkpoints did not greatly intrude upon travelers' sense of privacy. Drivers approaching these checkpoints were warned in advance of their presence. At the checkpoint, drivers could see that they were not the only ones being stopped. Visible signs of the officers' authority were everywhere. Each checkpoint was manned by at least eleven officers, with police cruisers present. Drivers who were stopped were immediately advised of the purpose of the stop. Most of those possessing a valid license were sent on their way after only about forty-five seconds. Those who had a valid license but could not produce it at the checkpoint were dispatched after only a few minutes. Even those driving without a valid license were detained for only ten minutes or so. Every driver stopped at one of Dayton's driver's license checkpoints was given a pamphlet explaining the checkpoint program and thanking him or her for cooperating. Clearly, these checkpoints constituted a very limited intrusion into travelers' privacy and sense of security.

Weighing against this minimal intrusion on privacy is the state's vital interest in using driver's license checkpoints to identify unlicensed drivers. The state has an interest in

ensuring that only those qualified to do so are permitted to operate motor vehicles and hence that licensing requirements are being observed. *Prouse, 440 U.S. at 658, 99 S. Ct. at 1398, 59 L. Ed. 2d at 670.* "Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to [*394] operate a motor [**1041] vehicle." *Id.* See, also, *R.C. 4507.11.*[2] As the court of appeals noted, "Persons who are too young or too old to drive pose a threat to the public safety." *State v. Smith, 2000 Ohio App. LEXIS 60* *38, (Jan. 14, 2000), Montgomery App. Nos. 17475, 17476 and 17477, unreported, *2000 WL 20882.* "Persons who have had their licenses suspended for convictions of operating a motor vehicle while under the influence of alcohol often disregard their suspensions and drive anyway, endangering the public." *Id.* In short, the state has a critical interest in protecting its citizens from drivers who either are not qualified to drive or have been forbidden

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[2] *R.C. 4507.11* provides:

"The registrar of motor vehicles shall conduct all necessary examinations of applicants for temporary instruction permits, drivers' licenses, or motorcycle operators' endorsements. The examination shall include a test of the applicant's knowledge of motor vehicle laws, including the laws on stopping for school buses, a test of the applicant's physical fitness to drive, and a test of the applicant's ability to understand highway traffic control devices."

to drive because of a record of driving offenses.[3]

Compounding the danger to the public from unlicensed drivers is the fact that much of the danger is hidden from plain view. While many types of dangerous motorists--drunk drivers, for example--exhibit erratic driving, the unlicensed driver often displays no observable characteristics. *Cloukey, 486 A.2d at 147.* Police officers on roving patrol cannot pull over a vehicle for the sole purpose of checking the driver's license and registration. *Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660.* Therefore, without checkpoints, the only way in which police can identify an unlicensed driver is by waiting for the driver to commit a driving offense. *Cloukey, 486 A.2d at 147.* In at least some instances, the offense would not even have occurred had the offending driver been detected earlier and been removed from the roadways.

The final consideration in our three-pronged analysis is the extent to which the driver's license checkpoints advanced the state interest. This requires us to consider the Dayton program's effectiveness in identifying unlicensed drivers.

In one two-week period, the Dayton police stopped 2,110 motorists and issued 224 traffic citations, resulting in a

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[3] According to Dayton's Police Driver's License Checkpoint Guidelines, adopted in 1998, of the almost 3.2 million drivers in the state of Ohio, approximately 800,000 had their licenses under some form of suspension. The introduction to the guidelines states that, in 1998, when the city of Dayton established its checkpoint program, approximately thirty percent of the traffic citations issued by the Dayton Police Department were for driver's license violations. It also reports that an estimated one in eight drivers on the streets of Dayton either did not have a driver's license or were driving under suspension.

citation rate of approximately 10.6 percent. By constitutional standards, this effectiveness rate of 10.6 percent is quite substantial. Although there was no evidence of how many of these citations were related to licensing, even if only a fraction of the citations were issued for driving without [*395] a valid license, the effectiveness rate in the case *sub judice* would still exceed rates sustained by the United States Supreme Court in analogous checkpoint cases. See *Sitz, 496 U.S. at 455, 110 S. Ct. at 2487, 110 L. Ed. 2d at 423* (1.6 percent arrest rate for drunk drivers); *Martinez-Fuerte, 428 U.S. at 554, 96 S. Ct. at 3081, 49 L. Ed. 2d at 1126* (apprehension of illegal aliens in 0.12 percent of vehicles passing through checkpoint).

In sum, assessing the checkpoints' intrusion on privacy, the state's interest in [**1042] maintaining driver's license checkpoints, and the extent to which Dayton's checkpoint program advanced the state interest, we find that Dayton's driver's license checkpoint program was consistent with the search and seizure provisions of the Ohio and United States Constitutions. We affirm the judgment of the court of appeals.

*Judgment affirmed.*

MOYER, C.J., DOUGLAS, RESNICK, PFEIFER and LUNDBERG STRATTON, JJ., concur.

COOK, J., concurs in judgment.

**APPENDIX B**

**IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO**

C.A. CASE NO. 17475
T.C. CASE NO. 98TRD12094
STATE OF OHIO
Plaintiff-Appellant,
v.
KEVIN L. SMITH
Defendant-Appellee.

. . . . . .

C.A. CASE NO. 17476
T.C. CASE NO. 98TRD11821
STATE OF OHIO
Plaintiff-Appellant,
v.
MAGUS D. ORR
Defendant-Appellee.

. . . . . .

C.A. CASE NO. 17477
T.C. CASE NO. 98TRD11978
STATE OF OHIO
Plaintiff-Appellant,
v.
ANDRE L. SMITH
Defendant-Appellee.

. . . . . .

**O P I N I O N**
Rendered on the 14th day of January , 2000.

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. . . . . .

BROGAN, J.

Pursuant to Crim.R. 12(J), the State of Ohio appeals the Dayton municipal court's decision suppressing evidence obtained at a driver's license checkpoint conducted by the Dayton Police Department in June of 1998. The State claims the municipal court erroneously concluded that the checkpoint was an unreasonable search and seizure in violation of the United States and Ohio Constitutions.

## I. FACTS

On June 16, 1998, Defendant-Appellee Magus Orr encountered a driver's license checkpoint conducted by the Dayton Police Department in the vicinity of Hoover and Brooklyn Avenues in Dayton. Orr was subsequently cited for driving without being properly licensed in violation of R.C. §4507.02(A)(1).

Defendant-Appellee Andre Smith (hereinafter "Andre") was stopped at a driver's license checkpoint conducted by the Dayton Police Department on June 17, 1998, near Lakeview and Adelite Avenues in Dayton. Andre was cited for driving without being properly licensed in violation of R.C. §4507.02(A)(1), operating a motorcycle without the required endorsement in violation of R.C. §4507.02(A)(3), driving with expired plates in violation of R.C. §4503.21, and operating a motorcycle without wearing a helmet as is required for novices pursuant to R.C. §4511.53.

On June 18, 1998, Defendant-Appellee Kevin Smith (hereinafter "Kevin") was driving westbound on Cornell Street when he spotted a driver's license checkpoint being operated by the Dayton Police Department. Approximately one hundred yards before the checkpoint, Kevin stopped his car, drove it in reverse eastbound in a westbound lane on Cornell Street for a distance of about one to two hundred feet, then backed into a driveway and pulled out onto Cornell Street heading away from the checkpoint. All of this took place in plain view of Dayton Police Officer Terry Zimmerman who was one of the officers on duty at the checkpoint. Zimmerman followed Kevin to his residence and cited him for driving without being properly licensed in violation of R.C. §4507.03(A)(1), failing to pay a reinstatement fee in violation of R.C. §4507.02, and driving while under suspension in violation of R.C.G.O. §71.19.

Orr, Andre (hereinafter "Appellees")[1], and Kevin entered pleas of not guilty at their arraignments. In addition, each filed a motion to suppress claiming his seizure was unconstitutional under both the United States and Ohio Constitutions, and that all evidence obtained as a result of his seizure should consequently be suppressed. A hearing was held on August 31, 1998, after which the trial court sustained Appellees' and Kevin's motions to suppress. The State's timely notices of appeal followed, and in a November 23, 1998, decision and entry, we granted the State's motion to consolidate the three cases.

**A. Kevin Smith**

Upon complete review of the record, we find it necessary to distinguish Kevin's case from those of the other two. Although the State has not raised the issue, we find *sua sponte* that Kevin cannot claim standing to challenge the constitutionality of the driver's license checkpoint. See *Warren County Park Dist. v. Warren County Budget Com'n* (1988), 37 Ohio St.3d 68 (raising the issue of an appellant's standing *sua sponte*). It is well settled that Fourth Amendment rights are personal and, thus, may not be vicariously asserted. *Rakas v. Illinois* (1978), 439 U.S. 128, 133-134. The circumstances leading up to Kevin's being stopped by Officer Zimmerman are somewhat analogous to those of the defendant in a Nebraska case, wherein the Nebraska Supreme Court reasoned as follows:

> While there may be nothing suspicious in making a lawful right turn onto an existing roadway or in making a lawful U-turn before reaching a roadblock,

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[1] Our reason for including only Magus Orr and Andre Smith in "Appellees" will soon be made apparent.

> we are persuaded that the conservation officer's observation of Giessinger's actions in driving the pickup onto the shoulder of the highway and switching places with the passenger prior to approaching the roadblock was sufficient to provide the officer with the reasonable suspicion necessary to justify the investigatory stop. That is to say, Giessinger's actions provided a basis independent of the roadblock which justified his stop.
>
> Thus, we do not reach the question whether the roadblock was lawful, for while Giessinger has standing to challenge the seizure of the vehicle in which he was riding, he does not have standing to challenge the seizure of other vehicles pursuant to the roadblock.

*State v. Giessinger* (Neb.1990), 454 N.W.2d 289, 294. See also *Murphy v. State* (Tex.App.1992), 864 S.W.2d 70, 77 (finding appellant lacked standing to challenge constitutionality of roadblock under nearly identical circumstances). The Nevada court's reasoning is persuasive.

In Kevin's case, according to Officer Zimmerman's uncontroverted testimony, Kevin committed a traffic violation which provided a justification for pursuing and citing him independent of the checkpoint by driving backwards eastbound in a westbound lane of traffic. Since Kevin never reached the checkpoint, and because his conduct gave Officer Zimmerman an independent reason for pursuing and citing him, he does not have standing to challenge the constitutionality of the checkpoint program. Therefore, we find the trial court erred in sustaining Kevin's motion to suppress on grounds that the checkpoint was unconstitutional. Accordingly, we reverse the decision of the trial court as to Kevin Smith and remand for further proceedings. The

remainder of this opinion consequently applies only to Magus Orr's and Andre Smith's cases.

**B. The Checkpoints**

At the suppression hearing, Lieutenant John Bardun III of the Dayton Police Department testified that he acted as commander of the checkpoint program during its development and operation. Pursuant to directions from Deputy Chief of Police Lieutenant Colonel John Compston, Bardun researched checkpoint programs in other jurisdictions. With the information gleaned from his research, and guidance from Dayton's legal director via a legal opinion, Bardun developed guidelines, which are neither at issue nor necessary to reproduce for present purposes.

Lieutenant Bardun testified that the primary function of the checkpoints was to check for individuals driving without a valid license, although he was aware of no correlation between a motorist's safe operation of a motor vehicle and his or her licensure through the Bureau of Motor Vehicles. Bardun also identified a secondary function which he described as a belief in the police department that the checkpoints would "have positive affects on crime rate and -- umm -- order maintenance." Tr. at 19.

Locations for the driver's license checkpoints were selected after input was had from the various District Commanders and the Assistant Chief of Police. Among the criteria considered in the site selection process were safety and traffic volume. Although Bardun referred to "target enforcement areas" in his testimony, he also acknowledged that no statistical analysis had been performed to determine whether or where within the city limits there might be a higher concentration of unlicensed drivers or drivers whose licenses had been revoked or suspended. Instead, the "target enforcement areas" were selected on the basis of their traffic

and crime problems as indicated by the district commanders, and the history and frequency of radar and/or laser units being placed at the site. In the end, two or three checkpoints were set up in each of the First, Second, Third, and Fifth Districts, but none were conducted in the Central Business District due to inclement weather.[2]

Upon arrival at the checkpoint site, participating officers would set up reflective signs measuring approximately three feet by three feet which warned drivers of the upcoming checkpoint. The signs were placed about one hundred yards before the checkpoint. At some of the checkpoint sites, motorists had an opportunity to avoid the checkpoint by turning onto a side street or making a legal U-turn; others provided no such opportunity. Although Lieutenant Bardun stated motorists who turned onto a side street before reaching the checkpoint were never pursued, he also testified that on at least some occasions, "where [the motorist] would turn the officers would follow them, run the registration, [and] see if there was some other reason to stop them." Tr. at 13.

The checkpoints were staffed by Lieutenant Bardun, a supervisor, and nine or ten officers, and were operated between the hours of 6:00 p.m. and 2:00 a.m. Generally, every car was directed through each checkpoint during its operation, unless the flow of traffic made it unsafe to do so. In that case, pattern stops in which every third, fourth, or fifth car would be directed to the checkpoint while the rest were waived through would be instituted as ordered by the

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[2] The Dayton Police Department is comprised of five districts, four of them identified numerically as Districts One, Two, Three, and Five, and one identified as the Central Business District. The reason for the conspicuous absence of a Fourth District has apparently been lost to history.

scene commander, Lieutenant Bardun. Deviation from the pattern was permitted only for safety reasons, and lasted only so long as the safety risk persisted. The average length of detention for those motorists possessing a valid license was forty-five seconds, according to Lieutenant Bardun. For those stopped at the checkpoint without their driver's license, the officers entered their names, dates of birth, and social security numbers into the KDT computers to check for a valid license which took an additional two minutes or so to complete. Provided the computer showed the motorist was properly licensed and was not wanted by the police for any other reason, he or she was given a pamphlet explaining the driver's license checkpoint program and was then free to go on his or her way. Individuals found driving after their license had expired were cited, which added approximately ten minutes to the length of their detention.

In all, over 2,100 cars were stopped, 224 traffic citations were issued, and 159 people were arrested as a result of the checkpoints. Like Appellee Andre Smith herein, however, some people received more than one citation, and Lieutenant Bardun was unable to state how many of the citations and/or arrests were for violations related to driver's licenses.

Officer Terry Zimmerman also testified at the suppression hearing, describing in detail the circumstances surrounding his pursuit and citation of Kevin Smith. Because we have found that Kevin Smith does not have standing to challenge the constitutionality of the checkpoint program, *supra*, we have no need to go into Officer Zimmerman's testimony to any greater degree than we have already.

## II. THE TRIAL COURT'S RULING ON APPELLEES' MOTIONS TO SUPPRESS

In granting the Appellees' motions to suppress, the municipal court reasoned as follows:

> There is no doubt that the government has a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles. Obviously, the state is concerned with roadway safety. However, the state presented no statistical evidence to show the number of accidents or fatalities caused by unlicensed drivers in contrast to those caused by licensed drivers. There was no evidence which indicated that unlicensed drivers posed more of a danger to others on the road than licensed drivers. Among the innumerable reasons that a person may not be properly licensed, many of the reasons are totally unrelated to one's ability to drive. A motorist in Ohio may have been properly tested and licensed but possess a suspended license for failure to pay a traffic ticket, a reinstatement fee, a ticket in another state, or failure to file an accident report, for example.

* * *

[T]here was no empirical evidence which indicated that drivers' license checkpoints would be an effective means of promoting roadway safety.

* * *

There was no evidence that the roadblock was a necessary tool for law enforcement

* * *

[or] that the officers were more efficient than they would have been had they been on routine patrol

* * *

The court consequently concluded that the State's primary interest in establishing the checkpoints was the apprehension of unlicensed drivers, not promoting roadway safety, and that

as such, the checkpoints constituted an unreasonable search and seizure in violation of the United States and Ohio Constitutions.

The State's appeal assigns three errors. First, it claims its interest in keeping unlicensed drivers off the road justifies the intrusion on motorists' Fourth Amendment interests. Next, it argues the absence of statistical support for its contention that unlicensed drivers present a greater threat on the road than do licensed drivers does not weaken its significant interest in roadway safety and the integrity of the driver's licensing scheme. Finally, the State claims the trial court erroneously usurped the power of those charged with allocating police resources by determining that the checkpoint program was an unnecessary and inefficient tool of law enforcement.

## III. BACKGROUND

Preliminarily, we note that constitutional analysis is a question of law which we review *de novo*. *State v. Ziepfel* (1995), 107 Ohio App.3d 646, 652. See also *Ornelas v. United States* (1996), 517 U.S. 690, 698-99 (stating legal conclusions of trial court are reviewed *de novo*); *State v. Musick* (1997), 119 Ohio App.3d 361, 367 (noting that trial court's application of substantive constitutional law is subject to *de novo* review); and *State v. Cossin* (1996), 110 Ohio App.3d 79, 81 (stating questions of law are reviewed *de novo*).

The question of the constitutionality of driver's license checkpoints has not been addressed by our supreme court. We note, however, that the appellate courts of this state have had several opportunities to consider the constitutionality of checkpoints or roadblocks set up for purposes such as checking for valid driver's licenses, sobriety, drug trafficking, and automobile safety equipment. Those cases, as well as the United States Supreme Court cases and the cases from other

states pertaining to checkpoints are enlightening and useful to our analysis. Thus, before continuing on to the merits of the Appellees' assignments of error, we give an overview of the current state of the law as it relates to checkpoints.

**A. United States Supreme Court Cases**

The right of the people to be free from unreasonable searches and seizures is guaranteed both by the Fourth Amendment to the United States Constitution, which is applicable to the states via the Fourteenth Amendment, *Mapp v. Ohio* (1961), 367 U.S. 643, 669; *Ker v. California* (1963), 374 U.S. 23, 30, and by Section 14, Article I, of the Ohio Constitution.[3] The Supreme Court of Ohio has recently examined the constructive and substantive similarities between the Fourth Amendment and its counterpart in the Ohio Constitution, stating as follows:

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[3] The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 14, Article I of the Ohio Constitution reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

> The language of Section 14, Article I of the Ohio Constitution and the Fourth Amendment is virtually identical. [Footnote omitted.] Accordingly, this court has interpreted Section 14, Article I of the Ohio Constitution as affording the same protection as the Fourth Amendment.

* * *

[T]his court in *State v. Geraldo* (1981), 68 Ohio St.2d 120, 125-126, stated:

> "The question is whether this court should imbue the state constitutional provisions regarding search and seizure with a more stringent standard of reasonableness than is required by the cognate federal constitutional provisions. * * * [W]e are disinclined to impose greater restrictions in the absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment. * * * It is our opinion that the reach of Section 14, Article I, of the Ohio Constitution * * * is coextensive with that of the Fourth Amendment." See, also, *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, fn. 1. [Parallel cites omitted.] Thus, case law indicates that * * * we should harmonize our interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment, unless there are persuasive reasons to find otherwise.

*State v. Robinette* (1997), 80 Ohio St.3d 234, 238-39. We are guided, nay bound, by the words of the Ohio Supreme Court as we proceed to our analysis of the City's assignments of error.

"Although the fourth amendment protects only reasonable expectations of privacy, * * * a motorist surrenders neither his reasonable expectations of privacy nor the protections of the fourth amendment when he steps into his automobile." *State v. McLaughlin* (Ind.App.1984), 471 N.E.2d 1125, 1130 (overruled on other grounds, *State v. Garcia* (Ind.1986), 500 N.E.2d 158, 162), citing *Katz v. United States* (1967), 389 U.S.347, 351-53, and *Delaware v. Prouse* (1979), 440 U.S. 648, 662-63. It is well-settled law that a seizure within the meaning of the Fourth Amendment occurs whenever a vehicle and its driver is detained by law enforcement officers, regardless of the detention's brevity. *Prouse*, *supra* at 653. That is not to say, however, that a warrant, or probable cause, or even reasonable and individualized suspicion must always be present for such a seizure to comport with the Fourth Amendment.

The Supreme Court has distinguished stops effected by roving patrols from checkpoint stops with regard to the need for some individualized suspicion of wrongdoing. In *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, for example, the Court considered the constitutionality of suspicionless stops by roving border patrols. There, the defendant was stopped near San Clemente, California by border patrol officers who later stated that their only reason for doing so was because the defendant and his passengers appeared to be of Mexican descent. The Court employed a test for the reasonableness of a seizure it had articulated in *Camara v. Municipal Court* (1967), 387 U.S. 523, 536-37, in which the government's need to search is balanced against the invasion of the individual's right to be free from arbitrary interference by law enforcement officers. Although the Court found the public interest in preventing illegal aliens from entering the country to be valid and the intrusion modest, it concluded that warrantless seizures by roving patrols, unaccompanied by

reasonable suspicion or probable cause, were constitutionally impermissible. See also *Almeida-Sanchez v. United States* (1973), 413 U.S. 266 (holding search of automobile by roving border patrol officers unconstitutional in the absence of probable cause or consent).

In *United States v. Martinez-Fuerte* (1976), 428 U.S. 543, the Court upheld the warrantless detention of a motorist detained without probable cause or reasonable suspicion at a permanent checkpoint established for the purpose of detecting and intercepting smugglers and illegal immigrants near our nation's border with Mexico. Again the Court balanced the public interest served by the seizure against the individual's right to personal security free from arbitrary interference by law enforcement officers. The Court noted that the public has a substantial interest in apprehending and deterring smugglers and illegal aliens from using the highways on which checkpoints are located. *Martinez-Fuerte*, *supra* at 556-57. In addition, to avoid the checkpoint, those involved in transporting illegal aliens into the country would necessarily be forced onto less-traveled roads causing them to be more easily detected by roving patrols. *Id.* at 557. The Court also explained that because no search of the vehicle or its occupants was performed, which effectively limited the officers' inspection to whatever might be in plain view, the "objective intrusion," defined by the Court as "the stop itself, the questioning, and the visual inspection," was minimal. *Id.* at 558. Further, the "subjective intrusion," consisting of "the generating of concern or even fright on the part of lawful travelers," was not as great when a stop is effected by way of a checkpoint rather than a roving patrol because, the Court reasoned, motorists could see that other vehicles were being stopped and would be reassured by the "visible signs of the officers' authority." *Id.* Moreover, the checkpoint stop at issue in *Martinez-Fuerte*, unlike the roving patrol stop in *Brignoni-*

*Ponce*, curtailed the border patrol officers' discretion since its location was selected by administrative officials responsible for allocating limited enforcement resources, rather than the officers in the field. Although the Court acknowledged the existence of other law enforcement mechanisms used by the border patrol in controlling the influx of illegal aliens from Mexico, specifically temporary checkpoints and roving patrols, it took pains to limit its holding to permanent checkpoints, explicitly stating that "[w]e are concerned here with permanent checkpoints." *Id.* at 553. In a footnote, the Court made mention of checkpoints established for purposes other than the interception of illegal aliens as follows:

> Stops for questioning, not dissimilar to those involved here, are used widely at state and local levels to enforce laws regarding driver's licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendants' position [that some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure], if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use.

*Id.* at 560, fn. 14. As if there were any doubt remaining about

the scope of the Court's ruling, in another footnote it stated the following:

> Our holding today, approving routine stops for brief questioning (a type of stop familiar to all motorists) is confined to permanent checkpoints. We understand, of course, that neither long-standing congressional authorization nor widely prevailing practice justifies a constitutional violation.

*Id.* at 566, fn. 19.

A few years later, the Court decided a case involving a police officer's roving stop of a vehicle for the purpose of checking the driver's license and automobile registration. *Delaware v. Prouse* (1979), 440 U.S. 648. In balancing the government's legitimate interests in ensuring the safety of its roadways against the intrusion on the privacy and security of motorists per the *Camara* test for reasonableness, the Court found such stops to be unconstitutional. It reasoned that in spite of the government's vital interest in assuring that only licensed drivers take to the roads, the State failed to show that the effectiveness of roving stops as a law enforcement technique was great enough to justify the intrusion on Fourth Amendment interests. *Id.* at 659. Citing the State's lack of empirical data showing random roving stops to be a productive method of apprehending unlicensed drivers and the lack of proof that such drivers would be deterred by the prospect of being stopped at random by a roving patrol, the Court stated that "[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure – limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable – at the unbridled discretion of law enforcement officials." *Id.* at 661.

In *dictum*, however, the Court noted that other less intrusive means of detecting unlicensed drivers that also curtail the law enforcement officers' discretion might be developed by the State. It suggested that "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663.

It was not until *Michigan Dept. of State Police v. Sitz* (1990), 496 U.S. 444, that the Supreme Court addressed the propriety of temporary checkpoints, though even then, it was in the context of a sobriety checkpoint rather than one established for the purpose of checking motorists' driver's licenses. In weighing the balancing factors as articulated in *Brown v. Texas* (1979), 443 U.S. 47, the Court noted that the seriousness and magnitude of the problems caused by drunken drivers was not subject to serious dispute. *Sitz* at 451. In addition, the "objective" intrusion attending the sobriety checkpoint in *Sitz* was found to be slight and indistinguishable from that accompanying the illegal alien checkpoint in *Martinez-Fuerte*. Remarking that the *Sitz* checkpoint was operated according to guidelines created by an advisory committee detailing the procedure to be used at the checkpoint, selection of its location, and any publicity, and that it was conducted by uniformed officers who briefly stopped every approaching vehicle, the Court found the "subjective" intrusion there to be no greater than what was present in the illegal alien checkpoints upheld in *Martinez-Fuerte*.

**B. Cases in Other States**

Most states have found the general concept of checkpoints established to deter and apprehend drunk drivers to be constitutional under both the federal and their state constitutions. See English, Comment, Sobriety Checkpoints Under State Constitutions: What has happened to *Sitz*?

(Winter 1998), 59 U. Pa. L. Rev. 453, 462-63, fn. 67 and accompanying text (listing thirty-one states that have upheld the constitutionality of sobriety checkpoints). It has been noted that the depth of analysis in cases affirming roadblocks or checkpoints varies greatly. *McLaughlin*, *supra* at 1135. In fact, some have relied almost exclusively on the Supreme Court's suggestion in the *Prouse dictum* that such stops might be constitutional if all approaching vehicles were to be stopped. *Id.* On the other hand, several states have relied on their state constitutions to find such stops unconstitutional. *English*, *supra*, (listing eight states holding sobriety checkpoints unconstitutional under state constitution).[4] Many states have been reluctant to distinguish sobriety checkpoints from checkpoints conducted, at least in part, to verify driver's licenses in any meaningful or outcome-altering way. See *LaFontaine v. State* (Ga.1998), 497 S.E.2d 367 (relying on *Sitz* in finding driver's license, insurance, and "other violations" checkpoint constitutional); *State v. Grooms* (N.C.App.1997), 483 S.E.2d 445, 446 (citing government's interest in "getting drunks off the road, recover stolen vehicles and find persons not served with outstanding warrants or summons" in upholding checkpoint designed to check driver's licenses, execute outstanding warrants, and intercept stolen vehicles); *State v. Barker* (Kan.1993), 850 P.2d 885, 887 (holding checkpoint designed to check driver's licenses and "reduce accident-related causative factors" constitutional); *Commonwealth v. Blouse* (Pa.1992), 611 A.2d 1177 (stating the rationale behind upholding sobriety

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[4] Interestingly, we notice that on remand from the United States Supreme Court, the sobriety checkpoints at issue in *Sitz*, *supra*, were declared unconstitutional under the state constitution by the state high court. *Sitz v. Dept. of State Police* (Mich.1993), 506 N.W.2d 209.

checkpoints applies equally to statutorily authorized driver's license/registration/equipment checkpoints).

The weight of authority among the state courts is that checkpoints for license and registration are not *per se* violations of the constitutional rights of motorists. Courts in at least twenty-four states and the District of Columbia have upheld some form of license and registration roadblock. See *McInnish v. State* (Ala.Cr.App. 1991), 584 So.2d 935; *Camp v. State* (Ark.App.1989), 764 S.W.2d 463; *People v. Alvarez* (Cal.1996), 926 P.2d 365; *People v. Andrews* (Colo.1971), 484 P.2d 1207; *Howard v. Voshell* (Del.Super.1992), 621 A.2d 804; *Duncan v. United States* (App.D.C.1993), 629 A.2d 1; *Rennard v. State* (Fla.App.1996), 675 So.2d 1006; *LaFontaine v. State* (Ga.1998), 497 S.E.2d 367; *People v. Bartley* (Ill.1985), 486 N.E.2d 880; *State v. Loyd* (Iowa 1995), 530 N.W.2d 708; *State v. Barker* (Kan.1993), 850 P.2d 885; *Kinslow v. Commonwealth* (Ky.App.1983), 660 S.W.2d 677; *State v. Cloukey* (Me.1985), 486 A.2d 143; *Miller v. State* (Miss.1979), 373 So.2d 1004; *State v. Severance* (N.H.1968), 237 A.2d 683; *State v. Kabayama* (N.J.Super.1967), 226 A.2d 760, affirmed without opinion by (N.J.1968), 246 A.2d 714; *State v. Valencia-Olaya* (N.M.App.1987), 736 P.2d 495; *State v. Grooms* (N.C.App.1997), 483 S.E.2d 445; *State v. Wetzel* (N.D.1990), 456 N.W.2d 115; *State v. Shankle* (Or.App.1982), 647 P.2d 959; *Commonwealth v. Blouse* (Pa.1992), 611 A.2d 1177; *Murphy v. State* (Tex.App.1992), 864 S.W.2d 70; *Lowe v. Commonwealth* (Va.1985), 337 S.E.2d 273; *State v. Davis* (W.Va.App.1995), 464 S.E.2d 598. At least three federal circuit courts of appeal have also upheld the constitutionality of license and registration checkpoints. See *United States v. Trevino* (C.A.7, 1995), 60 F.3d 333; *United States v. Prichard* (C.A.10, 1981), 645 F.2d 854; *United States v. McFaydon* (C.A.D.C.1989), 865 F.2d 1306.

High courts in six states have held that the DWI checkpoints found constitutional by the Supreme Court in *Sitz* violated particular provisions of their state constitutions *State v. Church* (La.1989), 538 So.2d 993; *Sitz v. Dept. of State Police* (Mich.1993), 506 N.W.2d 209; *Ascher v. Commr. of Public Safety* (Minn.1994), 519 N.W.2d 183; *State v. Koppel* (N.H.1985), 499 A.2d 977; *Pimental v. Dept. of Transp.* (R.I.1989), 561 A.2d 1348; *Seattle v. Mesiani* (Wash.1988), 755 P.2d 1057. In most of those states, presumably, checkpoints for drivers' licenses would also be found unconstitutional. Of those courts, however, one, the New Hampshire Supreme Court, has held that DWI checkpoints are more constitutionally offensive than license checkpoints, which the court had previously upheld. See *Koppel*, 499 A.2d at 980, distinguishing *State v. Severance* (N.H.1968), 237 A.2d 683. In *Koppel*, the New Hampshire court reiterated the position it adopted in *Severance* that license checkpoints are a reasonable means of enforcing a legitimate state interest, particularly because, without such checkpoints, most violations are undetectable. *Id.*

**C. Ohio Cases**

In Ohio, the cases have generally mirrored the reasoning of the Supreme Court cases above, distinguishing roving stops from checkpoint stops, and placing emphasis on the degree of the field officers' discretion in determining which motorists would be stopped and the extent of their inquiries after the stop. See *State v. Eggleston* (1996), 109 Ohio App.3d 217 (finding sobriety checkpoint constitutional after weighing state's interest against level of intrusion and after careful consideration of checkpoint's procedures, operation, and effectiveness); *State v. Bauer* (1994), 99 Ohio App.3d 505 (same); *State v. Myers* (1990), 63 Ohio App.3d 765 (recognizing that roving patrol officers must have "some

articulable and reasonable suspicion" that vehicle is unsafe before detaining driver); *City of Ironton v. Murnahan* (1987), 43 Ohio App.3d 91 (applying *Prouse* and finding stop by roving patrol to check for curfew, safety, and seat belt violations was unconstitutional); *State v. Goines* (1984), 16 Ohio App.3d 168 (relying on *Prouse* and *Martinez-Fuerte* and upholding constitutionality of safety equipment checkpoint on grounds that field officer's discretion was limited); *State v. Graham* (Nov. 1, 1990), Cuyahoga App. No. 57622; unreported (considering procedures, operation, and effectiveness of drug trafficking roadblock and finding it constitutional after applying *Brown* balancing test); *State v. Brown* (Dec. 30, 1993), Lucas App. No. L-93-094, unreported (holding sobriety checkpoint constitutional as implemented and operated); *State v. Kelley* (Apr. 13, 1994), Greene App. No. 93-CA-57, unreported (relying on *Sitz* in evaluating sobriety checkpoint procedures); *State v. Blackburn* (Mar. 23, 1994), Clark App. No. 3084, unreported (closely examining the effectiveness and procedures employed at sobriety checkpoint and holding it to be unconstitutional).

One relatively early court of appeals case has involved a checkpoint set up solely for the purpose of checking driver's licenses. See *City of Cuyahoga Falls v. Church* (1967), 10 Ohio App.2d 9. There, however, the court spent little time analyzing the constitutionality of the checkpoint itself. Instead, the court stated the following:

> As an indication of the extent to which a motorist must submit to the lawful demands of an officer to determine such motorist's right to exercise his license to operate a motor vehicle on the public highway, we cite the case of *Schmerber v. State of California*, 384 U.S. 757 [parallel cites omitted], decided June 20, 1966, by the Supreme Court of the United States,

> wherein that court found that a defendant's constitutional rights had not been violated by a compulsory blood test, and the admission of the evidence thereof at trial for driving a motor vehicle while intoxicated. (Cites omitted.)

*Church, supra* at 10.

## IV. THE ASSIGNMENTS OF ERROR

In its first assignment of error, the State argues that the trial court erred in finding the driver's license checkpoints unconstitutional. Specifically, the State claims that the constitutionality of the checkpoints is only vulnerable to an attack on the manner in which they are operated. This is so, contends the State, because the United States Supreme Court has determined that checkpoints are not *per se* violative of the Fourth Amendment so long as sufficient limitations are placed on the discretion of the officers on the scene of the checkpoints. In addition, the State argues that the its interest in keeping unlicensed drivers from using the roadways justifies the intrusion on motorists' Fourth Amendment interests. Finally, the State claims that because 7.5% of the motorists stopped at the checkpoints were arrested, the efficiency of the roadblocks in detecting unlicensed drivers cannot be questioned. In the second assignment of error, the State identifies two allegedly erroneous presumptions underlying the trial court's decision: (1) that unlicensed drivers are no greater threat on the road than licensed drivers, and (2) that the government's interest in checking for valid driver's licenses was limited to that of highway safety.

Essentially, the issue presented in the State's first and second assignments of error is whether, in the absence of statistical evidence showing unlicensed drivers to be a grave danger on the road or that unlicensed drivers were likely to

be deterred from driving because of the checkpoints, the government's interest or interests in keeping unlicensed drivers off the roads outweighed motorists' Fourth Amendment right to be free from unreasonable seizure. The State contends that its interest in roadway safety was sufficient to justify the checkpoints even without statistical support. Further, it argues that even if that were not so, it also had other interests in conducting the program that were not recognized by the trial court which, when combined with its interest in roadway safety, would unquestionably overcome motorists' Fourth Amendment right to travel the roads unimpeded. We observe that the State does not suggest that the trial court gave undue weight to the Fourth Amendment right at stake. In our analysis, therefore, we will limit our discussion to the government's interest and the proper weight it is to be given.

Additionally, although the State uses approximately half of the space devoted to its first assignment of error to defend the guidelines developed for implementing and operating the checkpoints, the trial court found no fault with those procedures. In fact, the court commended the police department on the thoroughness of the guidelines and on the officers' adherence to them. Consequently, our discussion will focus on whether the trial court erred in finding that the government's interest in roadway safety and enforcement of the driver's license law was sufficiently demonstrated at the suppression hearing.

There are actually two components to an evaluation of a government's interest in challenged seizures. One consists of a weighing of the gravity of the public concerns served by the seizure, and the other the degree to which the seizure advances the public interest. *Brown v. Texas*, 443 U.S. at 50-51. Pertaining to the first of these, we note that in *Delaware v. Prouse*, *supra*, the United States Supreme Court

acknowledged the government's vital interest in highway safety as follows:

> [W]e are aware of the danger to life and property posed by vehicular traffic and of the difficulties that even a cautious and an experienced driver may encounter. We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to operate a motor vehicle. The registration requirement and, more pointedly, the related annual inspection requirement in Delaware are designed to keep dangerous automobiles off the road. Unquestionably, these provisions, properly administered, are essential elements in a highway safety program.

*Id.* at 658. In the present case, the trial court acknowledged that the government has a vital interest in roadway safety, but concluded that in the absence of any evidence showing that unlicensed drivers are responsible for more traffic accidents or fatalities than licensed drivers, the State had failed to demonstrate by a preponderance of the evidence that the danger presented by unlicensed drivers was, by itself, of such magnitude to justify the intrusion on Fourth Amendment interests inherent in the checkpoints.

There seems little doubt that the United States Supreme Court would find license checkpoints constitutional if properly implemented. The Supreme Court in *Delaware v.*

*Prouse, supra,* noted in dicta that although "random" stops by officers to check the licensure of drivers was unconstitutional, states were not precluded from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion of the police officers. The court noted that the questioning of all oncoming traffic at roadblock-type stops is one possible alternative. 440 U.S. at 663

Judge Young finds the license checkpoint unconstitutional because the State failed to demonstrate by a preponderance of the evidence that the danger presented by unlicensed drivers was of such a magnitude to justify the intrusion caused by license checkpoints. The Supreme Court in *Prouse* however noted that states have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that the vehicles are fit for operation, and hence licensing, registration, and vehicle inspection requirements are being observed. 440 U.S. at 658.

In *Michigan Dept. of State Police v. Sitz* (1990), 496 U.S. 444, the United States Supreme Court held that Michigan's highway sobriety checkpoint program did not violate the Fourth Amendment because the balance of the State's interest in preventing drunken driving, the extent to which the system could reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped weighed in favor of the state program.

Chief Justice Rehnquist noted at page 453 of the Court's opinion:

> The Court of Appeals went on to consider as part of the balancing analysis the "effectiveness" of the proposed checkpoint program. Based on extensive testimony in the trial record, the court concluded that the checkpoint program failed the "effectiveness" part

of the test, and that this failure materially discounted petitioners' strong interest in implementing the program. We think the Court of Appeals was wrong on this point as well.

The actual language from *Brown v. Texas,* upon which the Michigan courts based their evaluation of "effectiveness," describes the balancing factor as "the degree to which the seizure advances the public interest." 443 U.S., at 51. *This passage from Brown was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers. Brown's* rather general reference to "the degree to which the seizure advances the public interest" was derived, as the opinion makes clear, from the line of cases culminating in *Martinez-Fuerte, supra.*

Neither *Martinez-Fuerte* nor *Delaware v. Prouse,* 440 U.S. 648 (1979), however, the two cases cited by the Court of Appeals as providing the basis for its "effectiveness" review, see 170 Mich. App., at 442, 429 N.W. 2d, at 183, supports the searching examination of "effectiveness" undertaken by the Michigan court. (Emphasis ours).

The State of Ohio certainly has an interest in keeping unlicensed drivers off the highway. Persons who are too young or too old to drive pose a threat to the public safety. Persons who have had their licenses suspended for convictions of operating a motor vehicle while under the influence of alcohol often disregard their suspensions and drive anyway endangering the public.

Admitted without objection was the Dayton Police Department's License Checkpoint Guidelines which were approved by the Deputy Chief. (State's Ex. 1). Col. Compston noted that the purpose of the checkpoints was to deter the operation of motor vehicles by unlicensed drivers. He noted that of almost 3.2 million drivers in the State of Ohio, approximately 800,000 have their driver's license under some form of suspension. He also noted that approximately 30% of the traffic citations issued by the Dayton Police Department are for driver's license violations and it is estimated that one in eight drivers in the City of Dayton are unlicensed.

In *City of Miami v. Aronovitz* (Fla. 1959), 114 So.2d 784, the court noted the following:

> When a license is revoked or suspended it is of major importance that the operator so restricted be prevented from driving an automobile during the penalty period. This is so because otherwise the restriction would be meaningless. Even more important, operators who have been proven to be negligent, incompetent and a public hazard would be in a position to continue operating motor vehicles without fear of apprehension or restraint in the absence of some reasonable inspection system. Consequently, it is very much in the public interest that law enforcement officers be permitted to make periodic check-ups on the driving

> license qualifications of those who operate motor vehicles on the highways.

In this case command officers at the Dayton Police Department decided that checkpoints were the most effective way to deal with the problem of unlicensed drivers. This certainly was a "reasonable law enforcement technique to deal with a serious public danger."

In *State v. Cloukey* (Me.1985), 486 A.2d 143, the Supreme Court of Maine validated license checkpoints and observed at page 146 of the Court's opinion:

> We believe that the State of Maine has a vital interest in protecting its citizens from persons who have either not qualified to drive or who have been declared incompetent to drive because of a record of serious driving offenses. This case does not involve a sobriety stop. *There may be many effective ways of detecting a drunken driver without intruding on the rights of the citizen. A trained eye can readily spot erratic operation. The unlicensed driver, however, displays no observable characteristics. If a license check under any circumstances is unreasonable, then in most instances, public protection must await the commission of another offense.* Although the state's interest would not sustain the highly intrusive roving stop of a single vehicle, it does sustain the less intrusive police practice employed in this case. (Emphasis ours).

The Supreme Court of New Hampshire reached a similar result in *State v. Severance* (N.H.1968), 237 A.2d 683. The court's holding was based on the demonstrable fact that road checks were the only effective means to law enforcement

authorities of enforcing license and registration laws. In a per curiam opinion, the supreme court observed:

> The mounting fatality rate in this state, the steadily increasing number of violations involving the operation of motor vehicles without licenses or registration, together with the number of accidents involving unlicensed drivers is a pressing problem which is more than a statistic. "Clearing the highways of irresponsible drivers" is one of the "problems that have taxed the ingenuity of lawmakers and administrators." *Calif. Auto Ass'n v. Maloney,* 341 U.S. 105, 110. See *State v. Despres* , 107 N.H. 297, 299. "If stopping motorists indiscriminately by police officers for the good faith purpose of inspecting or asking for the exhibition of a driver's license was not permitted, the licensing law would break down and become a nullity, and the objective for promoting public safety from irresponsible automobile drivers would be seriously impeded. There would be but few occasions when an officer could otherwise learn that the law was being violated." *Commonwealth v. Mitchell,* 355 S.W. 2d 686, 688-689 (Ky. App. 1962).

We are not persuaded by appellees' argument that the command staff of the Dayton Police is not politically accountable for their decision to implement license checkpoints. The command staff is not protected by civil service and is directly accountable to the Dayton City Manager who is directly accountable to the elected City Commission. There is little doubt that if citizens of the City of Dayton thought that license checkpoints were either too burdensome on its citizens or a waste of police resources, they could persuade their elected officials to stop their use.

Lastly, we agree with the State's third assignment that it was not proper for the trial court to substitute its judgment for that of the police department regarding whether the checkpoints were an efficient use of Dayton police officers.

The judgments of the trial court are Reversed and the causes are Remanded for further proceedings consistent with the opinion.

. . . . . .

GRADY, P.J., concurs.

YOUNG, J., concurring in part and dissenting in part:

I concur that Kevin L. Smith does not have standing to object to the constitutionality of the Dayton Police Department's license checkpoint program.

I must respectfully dissent from the majority's view that the program was in accordance with the Fourth Amendment of the United States Constitution and Section 14, Article I of the Ohio Constitution. In my view, the paucity of the State's evidence purporting to show that unlicensed drivers present a grave danger on the road as well as the effectiveness of the checkpoints in facilitating the apprehension of unlicensed drivers requires a conclusion different than that expressed by the majority.

The majority supports its decision with numerous cases involving checkpoints, including the Ohio case of *City of Cuyahoga Falls v. Church* (1967), 10 Ohio App.2d 9, 10, from which the majority quotes the following passage:

> As an indication of the extent to which a motorist must submit to the lawful demands of an officer to determine such motorist's right to exercise his license to operate a motor vehicle on the public highway, we cite the case of *Schmerber v. State of California*, 384

> U.S. 757 [parallel cites omitted], decided June 20, 1966, by the Supreme Court of the United States, wherein that court found that a defendant's constitutional rights had not been violated by a compulsory blood test, and the admission of the evidence thereof at trial for driving a motor vehicle while intoxicated.

Presumably, the majority is of the opinion that this excerpt stands for the proposition that government may go to great lengths in its mission to enforce the driver's license laws of the state, even where, as here, no probable cause or reasonable suspicion is present. The police officer who arrested the defendant in the *Schmerber* case cited by the *Church* court, however, was found to have had probable cause to arrest the suspect without a warrant, unlike the present case. Furthermore, the post-arrest blood sample discussed in *Schmerber* was lawfully taken pursuant to a well-recognized exception to the warrant requirement, namely, that the evidence, the defendant's blood alcohol level, would have dissipated before a search warrant could have been obtained and executed. Consequently, the *Church* court's comparison, and by implication, the majority's comparison in this case, of the search and seizure in *Schmerber* to that of a suspicionless checkpoint stop is peculiar.

The majority also cites twenty-four cases from other states in which license and registration checkpoints were found not to be in violation of the Fourth Amendment of the United States Constitution. All told, however, nine of those cases involved checkpoints established to detect violations other than those relating to driver's licenses and registration, including five relating to checkpoints designed to intercept, *inter alia*, drunk drivers, which, pursuant to *Sitz*, have been found to be constitutional. See *People v. Andrews*

(Colo.1971), 484 P.2d 1207 (considering checkpoint that included a safety inspection of the vehicle); *Duncan v. United States* (App.D.C. 1993), 629 A.2d 1 (involving checkpoint set up to intercept drunk drivers and drug traffickers); *Rennard v. State* (Fla.App.1996), 675 So.2d 1006 (evaluating constitutionality of checkpoint established to intercept drunk drivers, perform safety equipment checks, and to question motorists about a fugitive); *LaFontaine v. State* (Ga.1998), 497 S.E.2d 367 (considering license/registration checkpoint in which additional purpose was to discover "other violations"); *People v. Bartley* (Ill.1985), 486 N.E.2d 880 (finding sobriety checkpoint constitutional); *Kinslow v. Commonwealth* (Ky.App.1983), 660 S.W.2d 677 (holding sobriety checkpoint constitutional); *State v. Grooms* (N.C.App.1997), 483 S.E.2d 445.(evaluating constitutionality of checkpoint established for purpose of checking for outstanding warrants and stolen vehicles); *State v. Wetzel* (N.D.1990), 456 N.W.2d 115 (considering checkpoint that included a safety inspection of the vehicle); and *Lowe v. Commonwealth* (Va.1985), 337 S.E.2d 273 (upholding constitutionality of sobriety checkpoint). In addition, two of the cases cited by the majority never even reached the question of the checkpoint's constitutionality. See *Howard v. Voshell* (Del.Super.1992), 621 A.2d 804; *State v. Valencia*-Olaya (N.M.App.1987), 736 P.2d 495. Moreover, one of the federal cases cited by the majority as supporting the constitutionality of license and registration checkpoints actually involved a roadblock "established to respond to identified problems of traffic congestion," as illogical as that may be, and was instituted in response to citizens' complaints about drug trafficking in the area where the checkpoint was located. *United States v. McFayden* (C.A.D.C.1989), 865 F.2d 1306. Thus, while it may remain true that the "weight of authority" is in favor of the constitutionality of license/registration checkpoints, it is

so to a somewhat lesser degree than the majority opinion suggests.

In the present case, after hearing all the evidence presented at the suppression hearing, the trial court observed that "[t]here was no evidence which indicated that unlicensed drivers posed more of a danger to others on the road than licensed drivers." The majority dismisses the trial court's finding on the basis of the Supreme Court's observation in *Delaware v. Prouse* (1979), 440 U.S. 648, 658, that the states have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles and that the vehicles are fit for operation. That the State has such a vital interest is beyond question. Without meaningful discussion as to the seriousness or gravity of the unlicensed driver problem in Dayton, however, it is impossible to balance the state's interest against the intrusion into motorists' Fourth Amendment rights.

I agree with the trial court's result, although I believe the real question is not whether unlicensed drivers are more dangerous on the road than licensed drivers, but rather whether unlicensed drivers present a threat roughly equivalent to or greater than that posed by drunk drivers or excessive illegal immigration, both of which have been found to be of sufficient weight to justify intrusions on motorists' Fourth Amendment interests. See *Michigan Dept. of State Police v. Sitz* (1990), 496 U.S. 444; *United States v. Martinez-Fuerte* (1976), 428 U.S. 543; *State v. Eggleston* (1996), 109 Ohio App.3d 217. In other words, even assuming, as the majority does, that unlicensed drivers are less safe on the road than licensed drivers does not automatically result in a conclusion that the government's interest in removing the unlicensed driver from the road is equal in gravity to its interests in removing drunk drivers from the roadways or in assuring the integrity of our nation's border.

In *Martinez-Fuerte*, the Court cited statistics indicating that although legal immigration was limited by national policy to 120,000 people a year, 10 to 12 million illegal immigrants enter the United States each year, eighty-five percent of whom are from Mexico. *Id.* at 551. The Court also recognized the formidable law enforcement problem caused by such immigration. *Id.* at 552.

In contemplating the problems caused by intoxicated drivers, the Supreme Court stated in *Sitz*:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. "Drunk drivers cause an annual death toll of over 25,000 and in the same time span caused nearly one million personal injuries and more than five billion dollars in property damage." 4 W. LaFave, Search and Seizure: A treatise on the Fourth Amendment §10.8(d), p. 71 (2d ed. 1987). For decades, this Court has "repeatedly lamented the tragedy." (Citations and footnotes omitted.)

*Sitz, supra* at 451. Because the hazards of drunk driving are so much a part of our national consciousness, some courts have taken judicial notice of the government's overwhelming interest in deterring and apprehending those who drive while intoxicated. See, e.g., *State v. McLaughlin* (Ind.App.1984), 471 N.E.2d 1125, 1136. Research reveals no similar treatment of the problems associated with unlicensed drivers. At least one court has recognized that the "State has a much graver concern in detecting and deterring driving while intoxicated and under-age drinking" than it does in checking automobiles and drivers for proper registration and certification. *State v.*

*Garcia* (Ind.1986), 500 N.E. 2d 158, 161. But cf. *Commonwealth v. Blouse* (Pa.1992), 611 A.2d 1177, 1179 (reasoning that rationale for sobriety checkpoints applies equally to driver's license/registration checkpoints due to the "mass carnage" caused by unsafe automobiles and unlicensed drivers, but citing no statistics in support). I am aware of no court that has found the harm caused by unlicensed drivers alone to be comparable to that caused by drunken drivers or by the flood of illegal immigration occurring at our border with Mexico. Since the danger associated with unlicensed drivers is not a fact of which the trial court could have taken judicial notice, it was incumbent upon the State to show by a preponderance of the evidence that the dangers of driving without a license are so great that intrusions on motorists' Fourth Amendment rights are warranted to curtail the problem. I agree with the trial court that the State failed to carry its burden in that respect.

At the suppression hearing, Lieutenant Bardun testified as to the rationale behind and development of the checkpoint program. The testimony relevant to the problem sought to be if not remedied, then at least impacted by the checkpoints, is as follows:

> Q. So, would – Your checkpoints were for the sole purpose of driver's licenses, no other purpose?
>
> A. That was the primary function of it.
>
> * * *
>
> Q. And as to this particular – umm – type of checkpoint – umm – what – was there any rationale given as to why people who may or may not be driving without a driver's license were to be targeted?
>
> A. The explanation was given to me was that this is a

police tactic or practice that is being used successfully in other jurisdictions around the country – umm – New York City, Georgia, Florida, Texas and that we wanted to start using that as a practice.

* * *

Q. Was there any – umm – or are you aware in your 24 years as a police officer with the City of Dayton Police Department aware of any particular correlation between whether a person is valid with the Bureau of Motor Vehicles and their ability to actually operate a motor vehicle?

A. Not sure of any studies other than those persons who are licensed and are suspended that is based on some sort of driving other than the recent drug suspensions.

* * *

Q. But you're unaware of any correlations between a person safely operating a motor vehicle and whether they're valid with the Bureau of Motor Vehicles?

A. That's right.

* * *

Q. * * * Was there any – In the planning and selection of how many [checkpoints] to have in each district, was there any statistical analysis done of – umm – of – um – of the frequency of people driving without a driver's license, where they physically lived in this city?

A. No, sir, there was not.

Tr. at 11, 14-15, 16-17. Furthermore, the checkpoint guidelines themselves, which were admitted into evidence, contained the following introductory comments:

> The purpose of a driver[']s license checkpoint is to deter the operation of motor vehicles by unlicensed drivers or drivers whose licenses are under suspension.

> Of the almost 3.2 million drivers in the state of Ohio, approximately 800,000 have their driver[']s license under some sort of suspension. Approximately 30% of the traffic citations issued by the Dayton Police Department are for driver[']s license violations. It has been estimated that approximately 1 in 8 drivers on the streets of Dayton either do not have a driver[']s license or their license is suspended.

Nothing in the record indicates the trial court's conclusion that the primary purpose of the checkpoint program was the apprehension of unlicensed drivers rather than the promotion of roadway safety was arrived at erroneously.[5] Lieutenant Bardun, who was instrumental in developing the program, acknowledged that the primary purpose of the checkpoints was to check driver's licenses, but stated he did not conduct

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[5] In fact, after careful review of the entire record in this case, I cannot say the trial court would have erred had it held that the checkpoints were a pretext for a general "fishing expedition." For example, Lieutenant Bardun testified that the "target enforcement areas" were selected, at least in part, on the basis of the crime rate in the area and the district commanders' identification of their undefined "problem areas." Tr. at 18. Furthermore, he testified that the secondary function of the checkpoints was to have a "positive affects on crime and – umm –order maintenance." Tr. at 19. Lieutenant Bardun also testified that there were occasions when motorists who legally avoided the checkpoint by turning off the road on which it was being conducted were pursued and their license plate run through the computer to "see if there was some other reason to stop them." Tr. at 13. The implication that can be drawn from these statements is chilling.

any study to discover whether there is a correlation between motorists' driver's license status and unsafe operation of a motor vehicle, nor was he aware of any such study that may have been conducted by anyone else. The record contains no evidence indicating unlicensed drivers are disproportionately involved in traffic accidents, fatal or otherwise.[6] Moreover, although the introductory comments to the guidelines contain certain statements relating to unlicensed drivers in Ohio, they do not suggest such drivers are inherently unsafe on the road, nor do they establish that the checkpoints were contemplated as a method of improving roadway safety. On the contrary, the comments focus exclusively on the number of unlicensed drivers estimated to be present in the state with no reference whatsoever as to any danger they might pose to themselves, their passengers, or others on the roadways. The State claims the trial court erroneously presumed unlicensed drivers to be as safe, if not safer, than licensed drivers. This simply misstates the trial court's reasoning. What the court did was decline to presume, in the absence of any evidence to support the presumption, that unlicensed drivers are intrinsically unsafe behind the wheel of a motor vehicle. On the record before this court, I cannot agree with the majority that the court's reluctance in this regard was an abuse of discretion.

It is important to note, too, that not all license suspensions and revocations are a consequence of the licensee's poor driving ability. For instance, R.C. §4507.16(A) provides that

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[6] The State attached to its appellate brief an article which was published in 1996 and purports to estimate the exposure and fatal crash rates of unlicensed drivers in California. This article, though available at the time, was not introduced into evidence in the trial court and therefore forms no part of the record. App.R. 9(A). Consequently, it cannot be considered on appeal. App.R. 12(A)(1)(b).

a trial court may suspend or revoke a driver's license when a person is convicted of, *inter alia*, making a false affidavit or perjury under certain circumstances, a felony in the commission of which a motor vehicle was used, failure to stop and disclose identity when required by law, willfully eluding or fleeing a police officer, or trafficking in cigarettes to avoid payment of the cigarette tax. Thus, the majority erroneously assumes, in the absence of any supporting empirical evidence, that all or even most unlicensed drivers are so because of unsafe driving habits.

Furthermore, the estimate that thirty percent of the traffic citations issued by the State are for driver's license violations is meaningless without more since it is possible, perhaps even probable, that a significant portion of those citations were issued to licensed drivers who refused to display their license or who happened to be stopped without their license in their possession and were subsequently cited for failure to display their license in violation of R.C. §4507.35, neither of which necessarily implicates any dangerous driving practice on the part of the motorist. Nor does the bare estimate of what percentage of citations issued by Dayton police are for driver's license violations tell whether those eventually cited for such violations were initially stopped for unsafely operating their vehicles or some innocuous reason. For these reasons, I am unable to draw the conclusion from the police department's estimate that the State urges. Consequently, I would find no error by the trial court in its determination that the State failed to demonstrate by a preponderance of the evidence that unlicensed drivers present such a danger on the roadways that intrusions on motorists' Fourth Amendment interests are justified.

The State also contends, however, that the trial court erred in presuming that roadway safety was the only possible governmental interest to be served by the checkpoints. It

claims that its interest in maintaining the integrity of the driver's licensing scheme and court orders suspending driver's licenses combines with its interest in roadway safety to justify the intrusion inherent in the checkpoints.

In *State v. Blackburn* (Mar. 23, 1994), Clark App. No. 3084, unreported, this court expressed its disdain for the State's practice of requiring its citizens to furnish their identification at a sobriety checkpoint as follows:

> In essence, the sobriety checkpoint required all travelers on a particular highway at a particular time to furnish identification, as well as a vehicle registration. From time to time, in other countries, travelers have been required to produce their papers for inspection by the police. This has been a popular tool of totalitarian regimes to maintain control over the citizenry. It has yet to flourish on the soil of this country, and we are reluctant to provide it an opportunity to take root, no matter how laudable the purpose for which it is presently espoused.

*Id.* In the very next sentence, we found the sobriety checkpoint at issue to be unconstitutional under the Fourth Amendment to the United States Constitution. Less than a month later, we upheld a sobriety checkpoint program that did not include the requirement that motorists produce their driver's licenses for inspection. *State v. Kelley* (Apr. 13, 1994), Greene App. No. 93-CA-57, unreported. What was unacceptable under the guise of a sobriety checkpoint, is also unacceptable in isolation. I am cognizant that the majority may consider my position to be incongruous with the United States Supreme Court's statement in *Prouse* suggesting that roadblocks could be one viable alternative to roving patrols for driver's license checks. That statement, however, was

merely the Court's supposition in *dictum* that such methods might be constitutionally acceptable, and does not negate the requirement that the checkpoint scheme be a sufficiently productive means of advancing the State's interest in order to justify the intrusion upon motorists' Fourth Amendment interests. See *Prouse*, *supra* at 659. This point is made obvious by the Court's statements distinguishing *Sitz* from *Prouse* on the basis of, *inter alia*, *Prouse's* complete lack of empirical evidence indicating the roving stops would be an effective means of promoting roadway safety, and its reliance on the effectiveness of the *Sitz* checkpoint in finding it constitutional. *Sitz*, *supra* at 454. Here, the State fails to meet its burden with regard to the effectiveness of the driver's license checkpoints, a point that I address more fully below.

With no evidence to support its contention that unlicensed drivers pose a special safety hazard on the road, the State's regulatory interest in enforcing the driver's license law, or as the trial court put it, its interest in apprehending unlicensed drivers, was the only interest to be weighed in applying the *Brown* test to the facts of this case. The State's interest in enforcing the driver's license law, however, is no greater, and is perhaps less so, than its interest in enforcing any law. Surely, the State's interest in enforcing the laws against shoplifting, petty theft, and kidnaping, for instance, is at least as great as it is in enforcing the driver's license law. Yet there can be no doubt that checkpoints for the purpose of detecting such crimes would not pass constitutional muster. See *Blackburn*, *supra*, citing *State v. Henderson* (Idaho 1988), 756 P.2d 1057, 1063; and *State v. Smith* (Okla. Crim. App. 1984), 674 P.2d 562, 564-65. Thus, the State's interest here, though legitimate, is not, in and of itself, of such gravity that it justifies the checkpoint intrusions on motorists' Fourth Amendment right to be free from unreasonable seizures. I would overrule the State's first and second assignments of

error as to Magus Orr and Andre Smith.

The majority is persuaded by the State's contention that the checkpoint program was so effective in advancing its interest in enforcing the driver's license law that it outweighs motorists' Fourth Amendment interests. I cannot agree.

The trial court analyzed the effectiveness of the checkpoints as follows:

> There was no evidence that the roadblock was a necessary tool for law enforcement. Approximately ten to thirteen officers were taken out of service elsewhere to conduct the checkpoints from 6:30 p.m. to 1:30 a.m. Given the finite number of police officers and police resources, there was no evidence that the officers were more efficient than they would have been had they been on routine patrol investigating and arresting those committing traffic offenses or other offenses such as domestic violence, theft, burglary, robbery, prostitution and other crimes that plague the streets of Dayton and present obvious dangers to the community.

The State correctly argues that evaluation of the effectiveness of a checkpoint program does not include consideration of the necessity of the tactic to law enforcement, and that it is not for the courts to determine whether staffing the checkpoints was a wise use of police resources. As the majority points out, in *Sitz*, *supra*, the United States Supreme Court explained the appropriate effectiveness analysis as follows:

> The actual language from *Brown v. Texas*, * * * describes the balancing factor as "the degree to which the seizure advances the public interest." 443 U.S., at

> 51, 99 S.Ct., at 2640. This passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.

*Id.* at 453. Thus, I agree with the majority that the trial court improperly determined that the police officers on duty at the checkpoints could have been more efficiently used on patrol fighting the wide assortment of crimes that are perpetrated in Dayton. In my view, however, that finding does not negate the necessity of inquiring into whether the checkpoints were effective in accomplishing the purpose for which they were instituted.

While any analysis of a checkpoint's effectiveness should factor in its deterrent effect, no evidence was submitted to the trial court to suggest the checkpoints in this case had any deterrent effect whatsoever on unlicensed drivers taking to the roads. Moreover, since the checkpoints here were not publicized prior to their implementation, their deterrent effect, if any, would have been negligible.

As in sobriety checkpoint cases, however, effectiveness can be determined by calculating what percentage of the motorists passing through the checkpoints was cited or arrested for driver's license violations. In *Sitz*, *supra*, the checkpoint resulted in approximately 1.6 percent of the

drivers passing through the roadblock being arrested for driving under the influence of alcohol. *Id.* at 455. In Ohio, sobriety checkpoints with arrest rates of 2.3 percent, 2.1 percent, and .258 percent have been upheld as constitutional. *Bauer*, *supra* at 510; *Eggleston*, *supra* at 224; *State v. Brown*, *supra*. For the reasons that follow, however, these effectiveness rates cannot be compared with that of the checkpoints in the present case, and their relative effectiveness is consequently incalculable.

In its argument on the effectiveness of the checkpoints, the State claims that due to the difficulty of detecting unlicensed drivers, which it attributes to the lack of any "observable characteristics" that would presumably draw a patrolling officer's attention, the checkpoints are an important and effective method of advancing the government's interest in enforcing the requirement that motorists be properly licensed. This argument is contradicted, however, by the State's own statistic showing that prior to implementation of the checkpoint program, fully thirty percent of all traffic citations issued in the City of Dayton were for driver's license violations. Aside from the obvious contradiction in the State's arguments, it is clear that effective and productive means of detecting and citing unlicensed drivers, short of intrusions into motorists' Fourth Amendment interests, are in existence and have been successfully employed by the Dayton Police Department in the past.

Furthermore, even if every arrest and citation resulting from the checkpoints were for driving without a license, which is by no means established by the record, and assuming no violator received more than one citation, which is certainly not the case, only slightly more than eighteen percent of motorists stopped at the checkpoints would have been in violation of the driver's license law. Comparing the Dayton Police Department's two methods of detecting unlicensed

drivers, therefore, it can be concluded that routine patrol, which it is recalled has a license violation citation rate of 30%, is nearly twice as effective as the checkpoints.

In addition, and without considering the citations issued, the State argues that the arrest rate of the checkpoint, which it calculates to be at 7.5 percent, is proof of its effectiveness. It must be noted, however, that Lieutenant Bardun testified he was not sure how many of the arrests were for driver's license violations, making it impossible to gauge the effectiveness of the checkpoint program with any semblance of accuracy. At the suppression hearing, no evidence was produced showing any of the citations or arrests, other than those of the Appellees, were driver's license related. Although I suspect some were, suspicions should never form the basis of a judicial decision, regardless of their strength. Therefore, I would conclude that the State has failed to demonstrate by a preponderance of the evidence that the checkpoints were an effective method of advancing its interest in enforcing the driver's license law. Although the trial court reached the same result via a different route, I cannot say its conclusion was error. Consequently, I would overrule the State's third assignment of error as to Magus Orr and Andre Smith, and affirm the judgment of the trial court.

. . . . . .

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John J. Scaccia
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Hon. Alice O. McCollum

**APPENDIX C**

**IN THE DAYTON MUNICIPAL COURT**
**TRAFFIC DIVISION**

**CASE NO: 98 TRD 11821**
**(McCOLLUM, J.)**

**DECISION AND ENTRY**

**STATE OF OHIO**
**Plaintiff,**

**V.**

**MAGUS D. ORR**
**Defendant.**

This cause is before the Court on defendant's motion to suppress and the State's memorandum contra. The defendant, Magus Orr, is charged with driving without being properly licensed in violation of R.C. §4507.02(A)(1). On or about June 16, 1998, at the intersection of Hoover and Brooklyn in the City of Dayton, Montgomery County, Ohio, the defendant was stopped and detained as a result of a driver's license checkpoint operated by the City of Dayton Police Department. The defendant alleges in his motion to suppress that the use of the driver's license checkpoints violates defendant's rights guaranteed under the First and Fourth

Amendments to the United States Constitution; Article 1, Section 8 of the United States Constitution; and Article 1, Sections 1 and 14 of the Ohio Constitution.

The question before the Court is whether stopping an automobile being driven on a public highway at checkpoints pursuant to procedures promulgated by the Dayton Police Department for the sole purpose of checking the driver's license of the operator where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles is an unreasonable search and seizure and, therefore, unconstitutional.

This question is of first impression as it has not been address by case law in Ohio nor specifically by the U. S. Supreme Court. However, many of the ancillary issues presented by the motion to suppress have been resolved by case law.

There is no question that stopping an automobile and detaining its occupants constitutes a "seizure" even though the purpose of the stop is limited and the resulting detention quite brief. *United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 556-558, 96 S.Ct. 3074, 49 L. Ed.2d 1116. There is also no question that the random stopping and detention of a motor vehicle without articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered for the sole purpose of checking for driver's license and vehicle registration has been held to be an unreasonable search and seizure under the Fourth and Fourteenth Amendments. *Delaware v. Prouse* (1979) 440 U. S. 648, 663, 99 S. Ct. 1391, 59 L. Ed.2d 660. The Supreme Court did, however, suggest that there could be instances in which checkpoint stops set up to check for driver's licenses could pass constitutional muster. *Id.* at 663.

The Court of Appeals for the Second District has held that

a safety search conducted by a state highway patrolman in a non-random fashion so that motor vehicles are not being stopped pursuant to unbridled acts of whim, but as part of a calculated pattern of inspecting motor vehicles at a designated checkpoint does not violate the Fourth Amendment prohibition against unreasonable searches and seizures. *State v. Goines* (1984), 16 Ohio App. 3d 168, 16 O.B.R. 178, 474 N.E.2d 1219.

In *Michigan Dept of State Police v. Sitz* (1990), 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed.2d 412, the United States Supreme Court, using the balancing test from *Brown v. Texas* (1979), 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357, held that sobriety checkpoints were constitutional based on the fact that the state's interest in preventing drunken driving and the minimal degree of the intrusion weighed in favor of the state. *Id.* at 2488. In reaching this conclusion, the court examined the procedures used and found that all cars were stopped which minimized fear and surprise and the stop or intrusion lasted only for approximately twenty-five seconds. Considering the serious public danger and carnage that drunk drivers cause, the level of intrusion was held to be minimal. See also *State v. Eggleston* (1996), 109 Ohio App. 3d 217, 671 N.E.2d 1325.

Only when a seizure is "substantially less intrusive than the typical arrest" must the court apply the balancing test as espoused in *Brown, supra.* This test requires the court to weigh "the-gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with the individual liberty." *Id.* at 50-51, 99 S.Ct. at 2640. The action of the police must be justified at its inception and be a reasonable response to the problem that it addresses. *State v. Alexander,* (1985) 22 Ohio Misc. 2d 34, 35, 22 O.B.R. 342, 489 N.E.2d 1093. Simply stated, the court must examine the

extent of the intrusion on the individual contrasted with the importance of the law enforcement goal.

There is no doubt that the government has a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles. Obviously, the state is concerned with roadway safety. However, the state presented no statistical evidence to show the number of accidents or fatalities caused by unlicensed drivers in contrast to those caused by licensed drivers. There was no evidence which indicated that unlicensed drivers posed more of a danger to others on the road than licensed drivers. Among the innumerable reasons that a person may not be properly licensed, many of the reasons are totally unrelated to one's ability to drive. A motorist in Ohio may have been properly tested and licensed but possess a suspended license for failure to pay a traffic ticket, a reinstatement fee, a ticket in another state, or failure to file an accident report, for example.

The state has rules and regulations that should be adhered to and the government has a legitimate interest in ensuring that law are obeyed. However, an individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. *Delaware v. Prouse, supra,* at 662. Individuals are not shorn of Fourth Amendment protection when they step from the sidewalks into their automobiles. *Id.* at 663. In the instant case, there was no empirical evidence which indicated that drivers' license checkpoints would be an effective means of promoting roadway safety. Therefore, based solely on the evidence in this case, the court concludes that the state's primary interest in establishing the checkpoints was merely the apprehending of unlicensed drivers and not promoting roadway safety.

There was no evidence that the roadblock was a necessary tool for law enforcement. Approximately ten to thirteen

officers were taken out of service elsewhere to conduct the checkpoints from 6:30 p.m. to 1:30 a.m. Given the finite number of police officers and police resources, there was no evidence that the officers were more efficient than they would have been had they been on routine patrol investigating and arresting those committing ostensible traffic offenses or other offenses such as domestic violence, theft, burglary, robbery, prostitution and other crimes that plague the streets of Dayton and present obvious dangers to the community.

The court commends the police department for setting guidelines based on the legal opinion from the Dayton Law Department and adhering to them. The procedures established (1) the pattern stopping, (2) 45 seconds delay, (3) posted notices to the motorists, and (4) an attempt to place the checkpoints in all the districts, demonstrate an awareness that there are constitutional requirements that need to be addressed. The court is concerned that the areas chosen to conduct the checkpoints were "target areas", but this issue will not be addressed at this time. Neither will the court address the issue of the right to turn off before the checkpoint which was provided to some and not to others. Nor will the court address the issue of temporary versus permanent checkpoints.

The state bears the burden of proof by a preponderance of the evidence. Based on the foregoing, the courts find that the state has failed to meet that burden. The court finds that the checkpoints established merely for the apprehension of unlicensed drivers is an unreasonable search and seizure which violates the United States and Ohio Constitutions. Therefore, the defendant's motion to suppress is hereby **GRANTED.**

JUDGE ALICE O. McCOLLUM
DAYTON MUNICIPAL COURT

Copies to:

Prosecutor's Office
Carl G. Goraleski, Attorney for Defendant

**APPENDIX D**

**IN THE DAYTON MUNICIPAL COURT**
**TRAFFIC DIVISION**

**CASE NO: 98 TRD 11978**
**(McCOLLUM, J.)**

**DECISION AND ENTRY**

**STATE OF OHIO**
**Plaintiff,**

**V.**

**ANDRE L. SMITH,**
**Defendant.**

This cause is before the Court on defendant's motion to suppress and the State's memorandum contra. The defendant, Andre L. Smith, is charged with driving without being properly licensed in violation of R.C. §4507.02(A)(1), motorcycle endorsement required in violation of R.C. §457.02(A)(3), expired plates in violation of R.C. §4503.21 and helmet required for novice (motorcycle) in violation of R.C. §4511.53. On or about June 17, 1998, at the intersection of Lakeview and Adelite in the City of Dayton, Montgomery County, Ohio, the defendant was stopped and detained as a result of a driver's license checkpoint operated by the City of Dayton Police Department. The defendant alleges in his

motion to suppress that the use of the driver's license checkpoints violates defendant's rights guaranteed under the First and Fourth Amendments to the United States Constitution; Article 1, Section 8 of the United States Constitution; and Article 1, Sections 1 and 14 of the Ohio Constitution.

The question before the Court is whether stopping an automobile being driven on a public highway at checkpoints pursuant to procedures promulgated by the Dayton Police Department for the sole purpose of checking the driver's license of the operator where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles is an unreasonable search and seizure and, therefore, unconstitutional.

This question is of first impression as it has not been address by case law in Ohio nor specifically by the U. S. Supreme Court. However, many of the ancillary issues presented by the motion to suppress have been resolved by case law.

There is no question that stopping an automobile and detaining its occupants constitutes a "seizure" even though the purpose of the stop is limited and the resulting detention quite brief. *United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 556-558, 96 S.Ct. 3074, 49 L. Ed.2d 1116. There is also no question that the random stopping and detention of a motor vehicle without articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered for the sole purpose of checking for driver's license and vehicle registration has been held to be an unreasonable search and seizure under the Fourth and Fourteenth Amendments. *Delaware v. Prouse* (1979) 440 U. S. 648, 663, 99 S. Ct. 1391, 59 L. Ed.2d 660. The Supreme Court did, however, suggest that there could be instances in which

checkpoint stops set up to check for driver's licenses could pass constitutional muster. *Id.* at 663.

The Court of Appeals for the Second District has held that a safety search conducted by a state highway patrolman in a non-random fashion so that motor vehicles are not being stopped pursuant to unbridled acts of whim, but as part of a calculated pattern of inspecting motor vehicles at a designated checkpoint does not violate the Fourth Amendment prohibition against unreasonable searches and seizures. *State v. Goines* (1984), 16 Ohio App. 3d 168, 16 O.B.R. 178, 474 N.E.2d 1219.

In *Michigan Dept. of State Police v. Sitz* (1990), 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed.2d 412, the United States Supreme Court, using the balancing test from *Brown v. Texas* (1979), 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357, held that sobriety checkpoints were constitutional based on the fact that the state's interest in preventing drunken driving and the minimal degree of the intrusion weighed in favor of the state. *Id.* at 2488. In reaching this conclusion, the court examined the procedures used and found that all cars were stopped which minimized fear and surprise and the stop or intrusion lasted only for approximately twenty-five seconds. Considering the serious public danger and carnage that drunk drivers cause, the level of intrusion was held to be minimal. See also *State v. Eggleston* (1996), 109 Ohio App. 3d 217, 671 N.E.2d 1325.

Only when a seizure is "substantially less intrusive than the typical arrest" must the court apply the balancing test as espoused in *Brown, supra.* This test requires the court to weigh "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with the individual liberty." *Id.* at 50-51, 99 S.Ct. at 2640. The action of the police must be justified at its inception and be a

reasonable response to the problem that it addresses *State v. Alexander*, (1985) 22 Ohio Misc. 2d 34, 35, 22 O.B.R. 342, 489 N. E.2d 1093. Simply stated, the court must examine the extent of the intrusion on the individual contrasted with the importance of the law enforcement goal.

There is no doubt that the government has a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles. Obviously, the state is concerned with roadway safety. However, the state presented no statistical evidence to show the number of accidents or fatalities caused by unlicensed drivers in contrast to those caused by licensed drivers. There was no evidence which indicated that unlicensed drivers posed more of a danger to others on the road than licensed drivers. Among the innumerable reasons that a person may not be properly licensed, many of the reasons are totally unrelated to one's ability to drive. A motorist in Ohio may have been properly tested and licensed but possess a suspended license for failure to pay a traffic ticket, a reinstatement fee, a ticket in another state, or failure to file an accident report, for example.

The state has rules and regulations that should be adhered to and the government has a legitimate interest in ensuring that law are obeyed. However, an individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. *Delaware v. Prouse, supra,* at 662. Individuals are not shorn of Fourth Amendment protection when they step from the sidewalks into their automobiles. *Id.* at 663. In the instant case, there was no empirical evidence which indicated that drivers' license checkpoints would be an effective means of promoting roadway safety. Therefore, based solely on the evidence in this case, the court concludes that the state's primary interest in establishing the checkpoints was merely the apprehending

of unlicensed drivers and not promoting roadway safety.

There was no evidence that the roadblock was a necessary tool for law enforcement. Approximately ten to thirteen officers were taken out of service elsewhere to conduct the checkpoints from 6:30 p.m. to 1:30 a.m. Given the finite number of police officers and police resources, there was no evidence that the officers were more efficient than they would have been had they been on routine patrol investigating and arresting those committing ostensible traffic offenses or other offenses such as domestic violence, theft, burglary, robbery, prostitution and other crimes that plague the streets of Dayton and present obvious dangers to the community.

The court commends the police department for setting guidelines based on the legal opinion from the Dayton Law Department and adhering to them. The procedures established (1) the pattern stopping, (2) 45 seconds delay, (3) posted notices to the motorists, and (4) an attempt to place the checkpoints in all the districts, demonstrate an awareness that there are constitutional requirements that need to be addressed. The court is concerned that the areas chosen to conduct the checkpoints were "target areas", but this issue will not be addressed at this time. Neither will the court address the issue of the right to turn off before the checkpoint which was provided to some but not to others. Nor will the court address the issue of temporary versus permanent checkpoints.

The state bears the burden of proof by a preponderance of the evidence. Based on the foregoing, the courts find that the state has failed to meet that burden. The court finds that the checkpoints established merely for the apprehension of unlicensed drivers is an unreasonable search and seizure which violates the United States and Ohio Constitutions. Therefore, the defendant's motion to suppress is hereby **GRANTED.**

JUDGE ALICE O. McCOLLUM
DAYTON MUNICIPAL COURT

Copies to:

Prosecutor's Office
Carl G. Goraleski, Attorney for Defendant